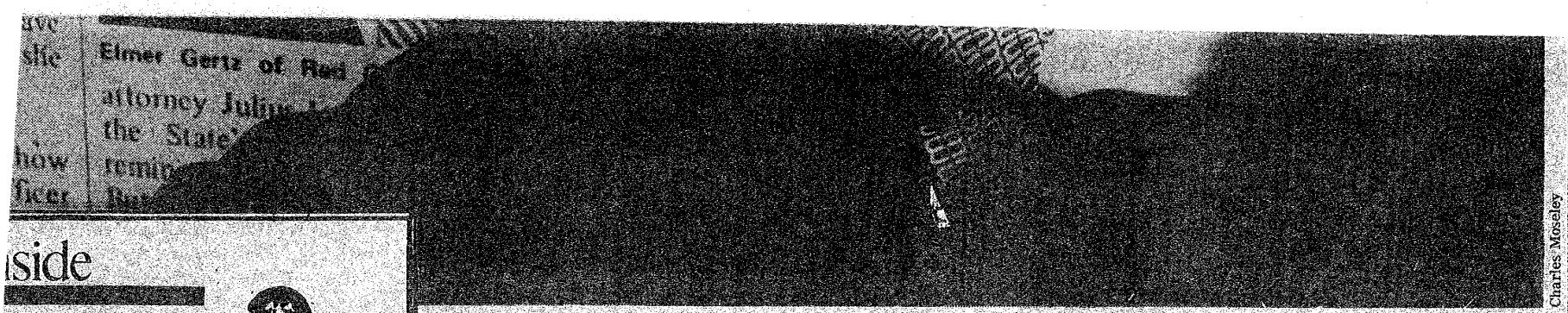

Charles Moseley

Gertz verdict: Leninist label was malicious libel

By Rob Warden

Elmer Gertz waited 12 years, but he says it was worth it: On April 22 a U.S. District Court jury awarded him $100,000 compensatory damages and $300,000 punitive damages in his landmark libel case against Robert Welch, Inc. But more important than the money, Gertz said, "Now those sons-of-bitches won't be so quick to call a president of the United States or anyone else a Communist."

Jury foreman Barry Brown said the jurors were "in complete agreement" from the start of their deliberations that Welch's American Opinion magazine, an outlet for views of the John Birch Society, was malicious when it published an article titled "Frame-up" in 1969 calling Gertz a "Leninist" and "Communist-fronter."

"It's not that I necessarily wanted to give $400,000 to Elmer Gertz," the 25-year-old foreman said outside the courtroom after the verdict was returned. "I was looking at it like I really wanted to punish the John Birch Society. The only question was the amount of the damages. I personally would have liked it higher because I wanted to stick it to the John Birch Society. Freedom of the press is fine, but to call someone a Communist can really hurt him. The Birch Society was totally out of line. It showed complete disregard for the public and for the truth."

The defamatory article was conceived by American Opinion managing editor Scott Stanley and written by Alan Stang, who in the magazine's pages also exposed several other *(See Page 16)*

Inside

Frame-up

(From Page 1) "Communists" and "fronters," such as John F. Kennedy, Martin Luther King, Jr., Hubert H. Humphrey and John Foster Dulles.

The thesis of the article was that there was a national conspiracy to discredit local police and establish a national police force that could support a Communist dictatorship. As part of this scheme, according to the article, "Leninist" and "Communist fronter" Gertz filed three civil suits to "harass" Chicago Police Patrolman Richard Nuccio, who had been convicted of shooting a youth in the back near Wrigley Field.

The article said that Gertz had signed two petitions urging abolition of the House Un-American Activities Committee (HUAC) and had been an officer of the National Lawyers Guild, the "legal bulwark of the Communist Party." The Lawyers Guild, according to the article, "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention."

Stang testified that the information that Gertz had been an officer of the Lawyers Guild and had signed the HUAC petitions was given to him by with any member of the news media and that the defamatory article injured him professionally.

A string of character witnesses, including Sun-Times columnist Irv Kupcinet, attorneys Albert E. Jenner, Jr. and Carole Kamin Bellows and Northwestern University Law Professor Jon R. Waltz used such adjectives as "excellent" and "the best" to describe Gertz's reputation as a lawyer and loyal American.

In his closing statement to the jury, Wayne B. Giampietro, Gertz's attorney, argued that the article was published with malice because Stanley "put the idea in Stang's mind. Everytime he sends Alan Stang out to write an article, Stang finds a Communist — Hubert Humphrey, Martin Luther King, John F. Kennedy, John Foster Dulles. Stang did exactly what Scott Stanley knew he was going to do. He didn't talk to anybody who wouldn't give him exactly what he wanted to hear. . . . He made up a pack of lies and he knew it, but he didn't care."

Stang exposed other "Communists" and "fronters," such as JFK, Martin Luther King, Jr., Hubert Humphrey and John Foster Dulles.

defendant under the "innocent construction" rule applicable in Illinois.

The rule, set by the Illinois Supreme Court in John v. Tribune Co., 24 Ill. 2d 437 (1962), requires that if it is possible to construe offensive language innocently it must be so construed by the courts. In a memorandum supporting his motion, Heldrich cited various Illinois cases in which such published epithets as "rip-off speculator," "arrogant nigger," "member of crime syndicate" and "political hack" have been held to be non-actionable under the rule.

"Are 'Leninist' and 'Communist-fronter' any worse than those?" Heldrich asked. He added, "Because the Gertz case has been to the Supreme Court, there was no way that the judge wasn't going to let it go to the jury."

After U.S. District Court Judge Bernard M. Decker set aside a $50,000 jury verdict in the Gertz case and the U.S. Court of Appeals for the Seventh Circuit affirmed, the U.S. Supreme Court in 1974 reversed and remanded the case for a new trial. In the process, the court rendered what is regarded by many as its most important libel decision since its famous New York Times v. Sullivan a decade earlier.

New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), barred media liability for defamation of public officials without proof of actual malice or reckless disregard for the truth. The New York Times rule was expanded to public figures in Curtis

such as Gertz, who was well known in some circles as a lawyer and writer, should not be deemed a public figure for all aspects of his life.

When the Gertz case originally was tried, Judge Decker instructed the jury that Gertz, a John Marshall Law School professor, was neither a public official nor a public figure. Because some statements in the article, if untrue, constituted libel per se under Illinois law, Decker instructed the jury that, if it found the allegations to be false, the only issue remaining for it to consider was the amount of damages.

However, after the jury awarded Gertz $50,000, Decker changed his mind and set aside the verdict, apparently anticipating the Supreme Court's decision in the then-under-advisement Rosenbloom case. The Supreme Court then decided Rosenbloom, and the Seventh Circuit cited that case in affirming Decker.

The Seventh Circuit noted that Stang's accusations against Gertz were part of the Birch Society's general thesis that there was a national conspiracy to harass the police and added: "[W]e may . . . assume that the article's basic thesis is false. Nevertheless, under the reasoning of New York Times Co. v. Sullivan, even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard for

a member of the Chicago Police Department's so-called Red Squad.

Stanley testified that to check the accuracy of Stang's reporting, "I reached to my right and pulled down Appendix 9," a 1944 HUAC report indicating that Gertz once had lectured at something called the Abraham Lincoln School, successor to "the Workers' School, a Communist educational medium in Chicago."

Stanley said he also checked another government publication that quoted the Internal Security Subcommittee of the Senate Judiciary Committee as having said in 1956 that, "To defend the cases of Communist lawbreakers, fronts have been devised [including the the National Lawyers Guild]. When the Communist Party itself is under fire these offer bulwark protection."

Beyond that, Stanley said, he relied only on Stang's reputation as "one of the most scrupulous reporters in contemporary political affairs." Stanley wrote an introduction to the article saying it was based on "extensive research" and wrote a photo caption: "Elmer Gertz of Red Guild harasses Nuccio."

Both Stanley and Stang acknowledged that they did not attempt to contact Gertz for comment before publishing the article, about 130,000 copies of which were distributed.

Gertz, 74, testified that he had resigned from the Lawyers Guild 15 years before the article was published, that it was not a Communist front, that he had nothing to do with the criminal case against Nuccio, that he never discussed the Nuccio case

Although no less an authority than the U.S. Supreme Court, which issued a landmark decision in the Gertz case in 1974, had branded the magazine's allegations against Gertz untrue, defense attorney Gerald C. Heldrich, Jr. defended the magazine with a classic Birch Society guilt-by-association line in his closing remarks to the jury: "If you swim with ducks, walk like a duck, talk like a duck and associate with ducks, we have every right to call him one."

Giampietro, asked the jury to award $500,000 compensatory damages — "a dollar a minute for all the time Elmer Gertz has had to suffer in one year" — and "at least twice as much" in punitive damages. Jury foreman Brown said the jury thought Giampietro had asked for too much money, but that his suggested 2-1 ratio of punitive damages to compensatory damages was too low. "That's why we raised it," he said.

Defense attorney Heldrich said Robert Welch, Inc. will appeal. To do so, the Massachusetts-based corporation must post a $600,000 bond — 150 percent of the award. The corporation has assets of less than $900,000, according to documents filed with the Massachusetts secretary of state.

"We believe we had the law, and the court did not follow the law," Heldrich said. He contended that U.S. District Court Judge Joel M. Flaum had erred in denying a motion for a directed verdict in favor of the

87 S.Ct. 1975 (1967), and to private persons involved in issues of significant public interest in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811 (1971).

But in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974), the court held that a private person injured by the publication of defamatory falsehoods may recover actual damages under a less-demanding standard than proving malice, although a showing of malice would be necessary to recover punitive damages. And it held that an individual

But the Supreme Court reversed 5-4. The majority opinion, written by Justice Lewis F. Powell, began: "This court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen."

In holding that Gertz was not a public figure in the *(See Page 20)*

Attorney Gerard C. Heldrich, Jr. (left) and client Scott Stanley Charles Moseley

Media

Seventh Circuit clarifies privilege to print a libel

Absent malice, publishers have a conditional privilege under Illinois law to print libels in reporting on government proceedings, but the privilege does not extend to articles that merely rely on the records of government proceedings, the Seventh Circuit U.S. Court of Appeals held on June 16.

"Where a publisher merely reports a statement, states it fairly, and does not modify or misstate the statement, the privilege is applicable, provided there is no actual malice," the court said. "Where, on the other hand, a statement in the record of a public proceeding is merely part of one's research, and is used to support an assertion not made in the public document, the privilege does not apply."

The unanimous decision with possibly important ramifications for investigative reporting was one of the last opinions written by the late Seventh Circuit Judge Robert A. Sprecher, and it is the latest chapter in the landmark libel case of Elmer Gertz v. Robert Welch, Inc.

The decision upheld a jury award of $100,000 in compensatory damages and $300,000 in punitive damages to Gertz, who was called a "Communist-fronter" and "Leninist" in 1969 by Welch's American Opinion Magazine, an organ of the John Birch Society.

The magazine contended that it relied on a 1944 House Un-American Activities Committee report, which characterized the National Lawyers Guild as the legal bulwark of the Communist Party. Since Gertz was a member of the guild in the 1940's and early 1950's, the magazine contended it had a right to call him a Communist-fronter in a 1969 article about a Chicago policeman charged with murder. Gertz represented the family of the victim in a civil proceeding.

The verdict in Gertz's favor was returned in April, 1981, before U.S. District Court Judge Joel M. Flaum, who had instructed the jury that the article was covered by the privilege and, therefore, the jury had to return a finding of actual malice to award even compensatory damages.

Flaum's ruling was somewhat ironic, given that it came in the remanded trial of the famous case in which the Supreme Court held 12 years earlier that Gertz, while well known as a lawyer, professor and writer, was not a public figure in the context that he was libeled by American Opinion. Thus, the Supreme Court held that to recover compensatory damages Gertz needed only to show that the magazine was negligent in publishing its false and defamatory accusations about him, but Flaum, in effect, overturned the Supreme Court.

While upholding the jury award to Gertz, the Seventh Circuit found that Flaum's application of the conditional privilege was overbroad, since the American Opinion article "neither focused on the public proceedings which are claimed as the source of the privilege, nor was the article contemporaneous with those proceedings."

The magazine, while agreeing with Flaum that the privilege applied, argued on appeal that he erred in submitting the question of malice to the jury since the Supreme Court had found that there was no malice. The Seventh Circuit said that the magazine misunderstood the Supreme Court, for it said only that malice had not been proved—not that it could not be proved in the case. □

Education